82-1206
No.

In the Supreme Court of the United States

October Term, 1982

Thomas Reusser, Administrator of the Estate of
Calvin E. Reusser
Petitioner

v.

American Bankers Insurance Company
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

David B. Vaughn
Suite 107
355 North Orchard
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QUESTION PRESENTED:

Whether the interpretation of a written contract is a matter of law, and therefore reviewable **de novo.**

In the Supreme Court of the United States

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Thomas Reusser, Administrator of the Estate of Calvin E. Reusser, petitions for a Writ of Certiorari to review the judgment of United States Court of Appeals for the Ninth Circuit entered in this proceeding August 11, 1982.

OPINION BELOW

The opinion of the court of appeals, which was ordered not to be published, appears in Appendix A hereto. The order denying **en banc** consideration appears in Appendix B.

JURISDICTION

The judgment of the court of appeals for the ninth circuit was entered on August 11, 1982. A timely petition for rehearing **en banc** was denied on

October 19, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTION PRESENTED

Whether the interpretation of a written contract is a matter of law, and therefore reviewable **de novo.**

STATUTORY PROVISION INVOKED

Federal Rules of Civil Procedure 52(a)

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

American Bankers Insurance Company (American) brought a declaratory judgment action to determine its liability under a policy issued to Calvin E. Reusser.

Reusser purchased the personal accident insurance by initialing acceptance on a car rental agreement. The acceptance acknowledged that he had read the coverage limits furnished in a synopsis. The synopsis, containing the intoxicant exclusion clause, was available in a rack adjacent to the rental counter.

The clerk at the counter did not recall the transaction with Reusser, but testified that she usually referred a customer to the brochure only upon being questioned about coverage.

Reusser was killed while driving the rental car in an intoxicated condition. The district court, sitting without a jury, found that Reusser had in fact read the brochure containing the exclusion condition and that American was not liable to Reusser's estate for the policy benefits.

The appellate court did not rule on the issue of fact as to whether or not Reusser read the brochure. Instead, the appellate court found that the district court's findings implicitly included the determination that the acknowledgment statement adequately notified the signer of the condition in the brochure, and stated that the determination was not clearly erroneous.

REASONS FOR GRANTING THE PETITION

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE PROPER STANDARD OF REVIEW APPLIED TO THE INTERPRETATION OF A WRITTEN CONTRACT.

Judge Learned Hand, writing for the court in *Eddy v. Prudence Bonds Corporation,* 165 F.2d 157, 163, certiorari denied, *Prudence Realization Corporation v. Eddy,* 333 U.S. 845, S.Ct. 664, 92 L. Ed. 1128, (2nd Cir. 1947), stated that "Appellate Courts have untrammelled power to interpret written documents."

Some scholars have questioned whether this is a workable rule. *(Weiner, The Civil Nonjury Trial and the Law-Fact Distinction,* Calif.L.Rev. 120, 1054 (1967). Some jurisdictions do not apply Judge Hand's pronouncement where the district court's decision was based on depositions, or documents that require non-legal expertise. (*Jennings v. General Medical Corporation,* 604 F.2d. 1300 (10th Cir. 1979); *Clark Equipment Company v. Keller,* 570 F.2d 778, certiorari denied, 99 S.Ct. 96, 439 U.S. 825, 58 L.Ed. 118 (8th Cir. 1978).

Likewise, where the parties to a contract negotiated the terms thereof, the extrinsic facts of what went into the negotiation are reviewable only by the stricter "clearly erroneous" standard. *(West v. Smith,* 101 U.S. 263, 270, 25 L.Ed. 809 (1879).

But where, as here, the only question is the

meaning of the words of a contract, at least eight of the other eleven circuits have ruled that they will place their own interpretation on the words of the written contract.*(Holtze v. Equitable Life Assur. Soc. of U.S.*,548 F.2d 1037, 179 U.S.App.D.C.82 (1976); *Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532, 537 (2d Cir. 1974); *EMOR, Inc. v. Cyprus Mines Corporation*, 467 F.2d 770,773 (3d Cir.1972); *In Re Stratford of Texas, Inc.* 635 F.2d 365, 368 (5th Cir. 1981); *Industrial Equipment Co. v. Emerson Elec. Co.*, 554 F.2d 276, 284 (6th Cir. 1977); *Wiesmueller v. Interstate Fire and Cas. Co.*, 568 F.2d 40, 42 (7th Cir.1978); *Western Contracting Corporation v. The Dow Chemical Co.*, 664 F.2d 1097, 1100 (8th Cir. 1981); *Southwestern Stationery & Bank v. Harris Corp.*, 624 F.2d 168, 170 (10th Cir. 1980).

The remaining circuits, the first, the fourth and the eleventh, do not appear to have made rulings contrary to these last cited opinions. We are unaware that the Supreme Court of the United States has yet ruled on the specific issue.

It is noted that the ninth circuit has decided not to publish their opinion, and have thus avoided written precedent in contradiction to the accepted standard of review. We presume that the precedent has, nevertheless, been established. It is unthinkable that the failure to publish is merely an expedient method of avoiding the establishment of an unfounded rule of law, and it is therefore apparent that the precedent stands in the minds of the judges that heard the case and those that reviewed the petition for **en banc** consideration.

2. IF THE OPINION BELOW IS ALLOWED TO STAND, A FINDING OF FACT STANDARD OF REVIEW CAN BE APPLIED TO A CONCLUSION OF LAW, MAKING THE DISTINCTION BETWEEN FACT AND LAW MEANINGLESS.

Written contracts affect every individual. In this day, insurance contracts are perhaps the most ubiquitous. Insurance contracts, beginning with maternity benefits and ending with burial policies, apply to nearly every phase of our lives.

When interpreting a contract, a trial judge may not create a finding of fact merely by labeling his decision as such. *(Tri-Ton Intrn. v. Velto,* 525 F.2d 432, 435 (9th Cir. 1975). But if the "clearly erroneous" standard of review is applied to the interpretation of a contract, the result is the same. In effect, the trial courts' decisions on the meanings of the written words in any contract become as findings of fact, reviewable only if clearly erroneous. If the ninth circuit's opinion is valid, we have lost a protection from a degree of arbitrariness or prejudice on the part of a trial judge that has heretofore been afforded by the appellate system to everyone who enters into a written contract.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the ninth circuit.

DATED this 14th day of January, 1983.

Respectfully submitted,

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APPENDIX A

No. 81-3421

D.C.# CV 79-1404

American Bankers Insurance Company,
Plaintiff/Appellee,

vs.

Thomas Reusser, Administrator of the Estate of
Calvin E. Reusser,
Defendant/Appellant.

MEMORANDUM

Appeal from the United States District Court for the District of Idaho.

Senior District Judge Fred M. Taylor Presiding

[Argued and Submitted July 7, 1982]

Before: WRIGHT, TANG and CANBY, Circuit Judges.

American Bankers Insurance Company (American) brought a declaratory judgment action to determine its liability under a policy issued to Calvin E. Reusser. The district court held the policy's intoxication exclusion effective against Reusser and found American not liable under the policy. We affirm.

Reusser purchased the personal accident insurance by initialing acceptance on a car rental agreement. The acceptance acknowledged that he had read the coverage limits furnished in a

synopsis. The synopsis, containing the intoxicant exclusion clause, was available in a rack adjacent to the rental counter.

The clerk at the counter did not recall the transaction with Reusser, but testified that she usually referred a customer to the brochure only upon being questioned about coverage.

Reusser was killed while driving the rental car in an intoxicated condition. The district court found that Reusser had in fact read the brochure containing the exclusion condition and that American was not liable to Reusser's estate for the policy benefits.

The estate administrator argues that the district court erred in finding that Reusser read the brochure and asks us to review the findings **de novo.**

Even if we should be inclined to undertake our own review, it is unnecessary to decide if Reusser actually read the brochure. His initials on the agreement, acknowledging his awareness of the coverage limits, presumptively bind him whether or not he read the synopsis. See West v. Prater, 57 Idaho 583, 67 P.2d 273, 278 (1927). His initials established American's prima facie case of notice. See Foremost Insurance Co. v. Putzier, 102 Idaho 138, 627 P.2d 317, 322 (1981); Harman v. Northwestern Mutual Life Insurance Co., 91 Idaho 719, 429 P.2d 849, 851 (1967). The administrator failed to come forward with evidence sufficient to refute the prima facie case. Harman, 429 P.2d at 851.

The administrator contends that the agreement was signed in haste, in an effort to expedite the rental. We know of no authority allowing haste to excuse responsibility for what one signs.

The administrator next argues that the acknowledgment statement on the rental agreement is ambiguous and cannot be interpreted to give notice of the exclusions in the brochure. The district court's findings implicitly include the determination that the acknowledgment statement adequately notified the signer of a reasonable condition. That determination is not clearly erroneous. See Pflueger v. Hopple, 66 Idaho 152, 156 P.2d 316, 318 (1945).

Finally, the administrator relies on the desk clerk's testimony that she referred to the brochure only when questions were asked. We agree that Reusser had no duty to request information about exclusions not revealed to him. Foremost Insurance Co. v. Putzier, 102 Idaho 138, 627 P.2d 317, 322 (1981). But having attested to his awareness of the policy limits, he had a duty to seek the information required to satisfy himself that the exclusions were acceptable. Foremost Insurance Co. v. Putzier, 100 Idaho 883, 606 P.2d 987, 991-992 (1980).

The district court did not err in holding the insured responsible for the acknowledgment he signed.

AFFIRMED.

APPENDIX B

American Bankers Insurance Company,
Plaintiff/Appellee,

vs.

Thomas Reusser, Administrator of the
Estate of Calvin E. Reusser,
Defendant/Appellant.

No. 81-3421

ORDER

Before: WRIGHT, TANG, and CANBY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing, and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

In the Supreme Court of the United States

October Term, 1982

No: _____

Thomas Reusser, Administrator of the
Estate of Calvin E. Reusser,
Petitioner,

vs.

American Bankers Insurance Company,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 1983, copies of this Petition were personally delivered to the office of Jeffery A. Strother, Esq., Boise, Idaho. I further certify that all parties required to be served have been served.

_____

DAVID B. VAUGHN
Counsel for Petitioner

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civ. No. 79-1404

American Bankers Insurance Company,
Plaintiff,

v.

Thomas Reusser, Administrator of the
Estate of Calvin E. Reusser,
Defendant

MEMORANDUM OF DECISION

Plaintiff, American Bankers Insurance Company (American), brought this action against the representative of the estate of Calvin Reusser, deceased, for a declaratory judgment determining its liability under a group accident insurance policy to which deceased became a member.

The matter was tried to the court, without a jury, and on submission was taken under advisement by the court for determination.

The stipulated facts as set forth in the pretrial order are as follows: Effective September 1, 1975, American issued Policy No. 1901 to an entity known as the Insurance Protection Trust. Later that month, Rent Car, Inc., the Hertz Rent-A-Car licensee in Boise, Idaho, began its participation in the group insurance program administered by the Trust. Rent Car received a copy of the policy in October, 1975. The policy provided, on the dates relevant to this lawsuit, accidental death benefits of $150,000 in addition to certain medical and

miscellaneous benefits. An exclusion in the policy provided:

> "This insurance shall not cover any loss caused directly or indirectly, wholly, or partly by . . . (e) intoxicants or narcotics . . ."

It is defendant's contention that the deceased as an insured was not informed of the exclusion and at the time he rented the automobile and procured the personal accident coverage from Rent Car he had no knowledge of the exclusion.

Calvin Reusser, deceased, rented a car from Rent Car's Boise airport outlet on the morning of July 6, 1979. In the course of the transaction, Reusser initialed a box on Rental Agreement No. L 2072771-1 and by doing so indicated his acceptance of Personal Accident Insurance (PAI) and acknowledged that he had read the "Synopsis of Coverage Limits" furnished by Rent Car at its Boise outlet. By initialing the box and agreeing to pay the necessary premium, Reusser became a member of the group covered under the policy issued by American. The rental agreement makes no other reference to the insurance coverage limits, exclusions or exceptions. Brochures explaining the coverage provided by the policy were available from the Rent Car facility at the Boise airport when Reusser entered into the rental agreement. The brochures stated "this insurance shall not cover any loss caused directly or indirectly by . . .(e) intoxicants or narcotics . . ."

At approximately 11:45 p.m. on July 6, 1979, Reusser was killed in a one-car accident near

Donnelly, Idaho. He was the driver and sole occupant of the car.

The outcome of this lawsuit is controlled by the resolution of two factual issues: (1) whether Reusser's death was caused, directly or indirectly, by intoxicants; and (2) whether Reusser was aware of the policy exclusion for injury or death so caused. Resolution of the first issue poses little difficulty. From the evidence adduced at trial, the court is firmly convinced that the accident and Reusser's death was in fact caused by his intoxication.

The second issue may be arguable and less clear. However, as set forth below, the court is of the opinion that the question of whether Reusser had knowledge of the exclusion regarding intoxicants must be answered in the affirmative. Immediately below the box marked "Accepts PAI" in which Reusser placed his initials, the following language appears in the Rental Agreement:

> BY INITIALS, Customer declines or accepts PAI. If 'Accepts', customer accepts coverage at rate shown and acknowledges to have read the SYNOPSIS of Coverage Limits furnished by Lessor at rental.

The synopsis admitted into evidence as plaintiff's Exhibit 9 contains the exclusion relating to intoxicants. According to the unrefuted testimony of Cynthia Clark, the Rent Car employee who handled the Reusser rental transaction, plaintiff's Exhibit 9 was available to customers at the Boise airport outlet, and was located in a rack on the

counter to the customer's right. There was no evidence adduced at trial to show the existence of any snyopsis other than Exhibit 9 at the airport facility. Defendant offered defendant's Exhibit 10, a similar snyopsis which did *not* contain the intoxicant exclusion, but due to the absence of any evidence showing its presence at the airport facility on July 6, 1979, the same was rejected for lack of relevancy.

Because Reusser, by his initials, acknowledged having read that synopsis of coverage "furnished by Lessor at rental", and because it appears from the evidence adduced that plaintiff's Exhibit 9 was the only synopsis available for him to have read at the airport facility, the court must find and conclude that Reusser did in fact read plaintiff's Exhibit 9 and thereby acquired actual knowledge of the exclusion regarding intoxicants contained therein. The defendant had the impossible burden of showing that the deceased did not read and have knowledge of the exclusion in regard to coverage. The defendant has not sustained this burden.

Accordingly, plaintiff is entitled to a judgment declaring that Reusser's death, as a result of the accident on July 6, 1979, was not covered by American Bankers Insurance Company Personal Accident Insurance Policy No. 1901. Counsel for plaintiff shall prepare proposed Findings of Fact and Conclusions of Law and Judgment, serve copies of the same on counsel for the defendant, and submit the originals to the court.

Dated this 18th day of May, 1981.

FRED M. TAYLOR
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

American Bankers Insurance Company,
Plaintiff,

v.

Thomas Reusser, Administrator of the
Estate of Calvin E. Reusser,
Defendant.

Case No. 79-1404

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 21, 1981, this action was tried to the court. Now, having considered the evidence adduced at trial and the written and oral arguments of counsel, the court believes itself to be fully advised of the facts and law relevant to this action and has reached the following conclusions:

FINDINGS OF FACT

1. American Bankers Insurance Company is a Florida corporation with its principal place of business in Florida. At all times relevant to this action, it was duly authorized to conduct business within Idaho;

2. Thomas Reusser is a citizen and resident of Idaho;

3. There is diversity of citizenship, and the amount in controversy in this action exceeds $10,000, exclusive of interest and costs;

4. Effective September 1, 1975, American Bankers issued Policy No. 1901 to the Insurance Protection Trust. Later that month, Rent Car, Inc., the Hertz Rent-A-Car licensee in Boise, Idaho, began its participation in the group insurance program administered by the Trust. Rent Car, Inc., operates three outlets in Boise, including one at the Boise Municipal Airport;

5. As amended, Policy No. 1901 provided, on the dates relevant to this lawsuit, insurance benefits of $150,000 payable on the death of a member of the group and benefits for medical and ambulance expenses incurred by members of the group with limits of $1,500 and $150 respectively;

6. Policy No. 1901 included the following provision:

> "This insurance shall not cover any loss caused directly or indirectly, wholly, or partly by . . . (e) intoxicants or narcotics . . ."

7. On July 6, 1979, Calvin Reusser rented a car from Rent Car at the outlet in the Boise airport. The terms of the agreement between Reusser and Rent Car appear in Rental Agreement No. L 2072771 1. In the course of the transaction, Reusser initialed a box on this rental agreement indicating his acceptance of Personal Accident Insurance (PAI) and acknowledging that he had read the "Synopsis of Coverage Limits" furnished by Rent Car at the outlet. The synopsis was located in a rack on the counter to Reusser's right. The synopsis stated:

"This insurance shall not cover any loss caused directly or indirectly by . . . (e) intoxicants or narcotics . . ."

This synopsis was available for Reusser's inspection when he entered into the rental agreement;

8. Reusser read the synopsis and knew of the exclusion of coverage regarding intoxicants;

9. At approximately 11:45 p.m. on July 6, 1979, Reusser was killed in a one-car accident near Donnelly, Idaho. He was the driver and sole occupant of the car;

10. On July 20, 1979, the Idaho Bureau of Laboratories conducted an accurate test of a blood sample taken from Calvin Reusser's body that showed the blood alcohol content of the sample to be .26;

11. At the time of the accident, Calvin Reusser was intoxicated. This intoxication was the direct cause of the accident and Reusser's death.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this litigation. Venue is proper in this court;

2. Coverage under Policy No. 1901 for Reusser's death is excluded by the terms of the exclusion concerning intoxicants;

3. Calvin Reusser had notice of the terms of this exclusion when he entered into the rental agreement;

4. American Bankers is entitled to judgment declaring that Reusser's death was not covered by the PAI purchased by Reusser when he rented the car on July 6, 1979.

DATED this 19th day of June, 1981.

FRED M. TAYLOR
District Judge

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

Civil No. 79-1404

American Bankers Insurance Company,
Plaintiff,

v.

Thomas Reusser, Administrator of the Estate of Calvin E. Reusser,
Defendant.

JUDGMENT

On April 21, 1981, this action was tried to the Court. Having considered the evidence adduced at trial and the arguments of counsel, and the court having previously entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiff American Bankers Insurance Company declaring that the death of Calvin Reusser on July 6, 1979, was not covered by the terms of the Personal Accident Insurance purchased by Reusser on July 6, 1979.

American Bankers is also entitled to costs of $_____, and the court now grants judgment in plaintiff's favor for that sum.

DATED this 19th day of June, 1981.

FRED M. TAYLOR
United States District Judge

No. 82-1206

In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent's Brief in Opposition to Petition for Writ of Certiorari

QUESTION PRESENTED FOR REVIEW

Respondent contends that the Question Presented by the Petitioner has no relevance to this Court's review of the decision of the Ninth Circuit Court of Appeals. Respondent maintains that the only issue for review is whether the Ninth Circuit's affirmation of the trial court's findings of fact was correct.

PARTIES INVOLVED IN PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties to the proceeding in the Ninth Circuit Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Respondent is satisfied with Petitioner's Jurisdictional Statement.

STATUTORY PROVISION INVOKED

Respondent is satisfied with the statutory provision set forth by Petitioner.

STATEMENT OF THE CASE

Respondent American Bankers Insurance Company (American) submits this statement for the purpose of addressing two omissions in the Statement of the Case of the Petitioner, Thomas Reusser, Administrator of the Estate of Calvin E. Reusser (Administrator). First, the Administrator's Statement of the Case is misleading with regard to its rendition of the Ninth Circuit Court of Appeals' decision. The Administrator's Statement of the Case recites:

> The appellate court did not rule on the issue of fact as to whether or not Reusser read the brochure. Instead, the appellate court found that the district court's findings implicitly included the determination that the acknowledgment statement adequately notified the signer of the condition in the brochure, and stated that the determination was not clearly erroneous. (Petition for Certiorari, p. 5)

The Administrator, in his rendition of the Ninth Circuit's decision, failed to include the reason the appellate court did not find it necessary to rule on the issue of fact regarding whether or not Calvin E. Reusser (Reusser) actually read the synopsis. The Ninth Circuit reasoned that:

> [Reusser's] initials on the agreement, acknowledging his awareness of the coverage limits, presumptively bind him whether or not he read the synopsis. [Citations omitted]. His initials established American's prima facie case of notice. [Citations omitted]. (Petition for Certiorari, p. 11).

Once the Ninth Circuit's reasoning behind the statement that it was unnecessary to determine if Reusser actually read the brochure is considered, the propriety of the Ninth Circuit's affirmation of the trial court's findings and conclusions becomes clear.

Second, the Administrator's Statement of the Case fails to set forth the factual basis for federal jurisdiction in the first instance. American is a Florida Corporation with its principal place of business in Florida and it was authorized to conduct business within Idaho at all times relevant to this action. The Administrator was a citizen and resident of the State of Idaho at all times relevant to this action. Thus, there was diversity of citizenship when this action was filed and the amount in controversy exceeded $10,000, exclusive of interest and costs.

SUMMARY OF ARGUMENT

There are no real legal issues raised by the Petition for Writ of Certiorari. The Petition requires that this Court review findings of fact that have already been determined to be "not clearly erroneous." For this reason, the Petition should be denied.

ARGUMENT

THE QUESTION PRESENTED BY THE ADMINISTRATOR HAS NO RELEVANCE TO THE NINTH CIRCUIT COURT OF APPEALS' DECISION. THEREFORE, THERE IS NO REASON FOR THIS COURT TO GRANT CERTIORARI.

The Administrator has misinterpreted the trial court's Memorandum of Decision and Findings of Fact and Conclusions of Law. For that reason, he has mischaracterized the decision of the Ninth Circuit. That has led him to define a question for this Court's review that has absolutely no bearing on the facts and law of this action.

The outcome of the lawsuit on the trial level was determined by the resolution of two issues: (1) whether Reusser's death was caused by intoxicants; and (2) whether Reusser had notice of the exclusion in his insurance barring the payment of benefits for any death caused by intoxicants. The interpretation of the exclusion itself has never been an issue in this lawsuit. The trial court answered the first question affirmatively, and the Administrator has not disputed that conclusion on appeal. The trial court also answered the second question affirmatively, and it was that conclusion that provoked the appeal to the Ninth Circuit and the Petition for Writ of Certiorari to this Court.

Contrary to the suggestion by the Administrator in his petition, the trial court did not decide the notice issue solely by interpreting a written document. The written acknowledgment by Reusser that he had read the "Synopsis

of Coverage Limits" furnished by the Hertz rental outlet was indeed one of the factors considered by the court. But the court did not deem the written acknowledgment to be decisive, for it went on to consider, as an issue of fact, what synopsis might have been read by Reusser. American offered proof showing the presence of a synopsis including the relevant exclusion. The Administrator failed in his attempt to prove the presence of another synopsis which did not set forth the exclusion. The evidentiary rulings by the trial court that led to this failure have not been raised on appeal.

Hence, it is apparent that the trial court, in rendering its decision, considered the written language of the acknowledgment signed by Reusser and all of the other circumstances surrounding the transaction that bore on the issue of proving what was intended by the reference in the acknowledgment to the "Synopsis of Coverage Limits." Based on all of this evidence, the trial court concluded, as a matter of fact, that the synopsis was the one including the exclusion. This is strictly in accord with the requirements of Idaho law. *See International Engineering Co.* v. *Daum Industries, Inc.*, 102 Idaho 363, 630 P.2d 155 (1981). The court then relied on the written acknowledgment to conclude, again as a matter of fact, that Reusser read the synopsis and knew of the exclusion of coverage regarding intoxicants. There was, in fact, no evidence to the contrary. After that determination, the conclusion that Reusser had notice of the exclusion followed as a matter of law. *See Restatement (2d) of Agency* §9(1) (1957); *Sulik* v. *Central Valley Farms, Inc.*, 95 Idaho 826, 521 P.2d 144 (1974).

For purposes of this petition, the two most significant aspects of the trial court's findings of fact and conclusions of law are: (1) the interpretation of the written acknowledgment was decided on the basis of the written language and all

other relevant facts showing what the acknowledgment meant, and (2) the interpretation was done as a matter of fact and not of law.

On appeal to the Ninth Circuit, the Administrator disputed the finding of fact that Reusser read the synopsis including the exclusion regarding intoxicants and the corresponding conclusion of law that he had notice of that provision. In substance, the Ninth Circuit concluded that the challenged finding was not clearly erroneous and would not be disturbed. Once the finding passed muster, the legal conclusion that Reusser had notice of the exclusion was plainly correct. For these reasons, the Ninth Circuit affirmed the trial court.

The Administrator has defined the question presented by his Petition for Writ of Certiorari as:

> Whether the interpretation of a written contract is a matter of law, and therefore reviewable *de novo*.

(Petition for Certiorari, p. 4). In the context of the trial court's Memorandum of Decision and Findings of Fact and Conclusions of Law and the Ninth Circuit's Opinion, it is difficult to see what relevance this issue has to this lawsuit. The Administrator appears to question, as a matter of law, the interpretation of the written acknowledgment, but the trial court decided that interpretation as an issue of fact after considering the language of the acknowledgment and all other circumstances surrounding the transaction. The Ninth Circuit affirmed that decision as not being clearly erroneous. Nothing in this case was decided as a matter of law after reviewing the language of a written document. This distinguishes this case from all of those cited by the Administrator in his petition. In each of those cases, a contract was interpreted solely on the basis of the written language without regard to the surrounding factual circumstances.

There is, therefore, no conflict between this decision and precedent from either the Ninth or any other circuit courts.

CONCLUSION

Granting the Petition for Writ of Certiorari would require this Court to review findings of fact that have already been determined to be "not clearly erroneous." (Petition for Certiorari, p. 12). There are simply no legal issues raised by the Petition. The case is therefore not important enough to warrant this Court's attention, for its final decision would amount at most to a reworking of the trial court's inferences from the proven facts. This Court has frequently stated that it does not grant certiorari to review evidence and discuss specific facts. *E.g.*, *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). Certiorari should therefore be denied.

DATED this 16th day of February, 1983.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civ. No. 79-1404

American Bankers Insurance Company
Plaintiff

v.

Thomas Reusser, Administrator of the Estate
of Calvin E. Reusser
Defendant

MEMORANDUM OF DECISION

Before: Senior District Judge Fred M. Taylor
[Filed May 18, 1981]

Plaintiff, American Bankers Insurance Company (American), brought this action against the representative of the estate of Calvin Reusser, deceased, for a declaratory judgment determining its liability under a group accident insurance policy to which deceased became a member.

The matter was tried to the court, without a jury, and on submission was taken under advisement by the court for determination.

The stipulated facts as set forth in the Pretrial Order are as follows: Effective September 1, 1975, American issued Policy No. 1901 to an entity known as the Insurance Protection Trust. Later that month, Rent Car, Inc., the Hertz Rent-A-Car licensee in Boise, Idaho began its participation in the group insurance program administered by the Trust. Rent Car received a copy of the policy in October, 1975. The policy provided, on the dates relevant to this lawsuit, ac-

cidental death benefits of $150,000 in addition to certain medical and miscellaneous benefits. An exclusion in the policy provided:

> "This insurance shall not cover any loss caused directly or indirectly, wholly, or partly by . . . (e) intoxicants . . .".

It is defendant's contention that the deceased as an insured was not informed of the exclusion and at the time he rented the automobile and procured the personal accident coverage from Rent Car he had no knowledge of the exclusion.

Calvin Reusser, deceased, rented a car from Rent Car's Boise Airport outlet on the morning of July 6, 1979. In the course of the transaction, Reusser initialed a box on Rental Agreement No. L 2072771-1 and by doing so indicated his acceptance of Personal Accident Insurance (PAI) and acknowledged that he had read the "Synopsis of Coverage Limits" furnished by Rent Car at its Boise outlet. By initialing the box and agreeing to pay the necessary premium, Reusser became a member of the group covered under the policy issued by American. The rental agreement makes no other reference to the insurance coverage limits, exclusions or exceptions. Brochures explaining the coverage provided by the policy were available from the Rent Car facility at the Boise Airport when Reusser entered into the rental agreement. The brochures stated "this insurance shall not cover any loss caused directly or indirectly by . . . (e) intoxicants or narcotics . . . "

At approximately 11:45 p.m. on July 6, 1979, Reusser was killed in a one-car accident near Donnelly, Idaho. He was the driver and sole occupant of the car.

The outcome of this lawsuit is controlled by the resolution of two factual issues: (1) whether Reusser's death was caused,

directly or indirectly by intoxicants; and (2) whether Reusser was aware of the policy exclusion for injury or death so caused. Resolution of the first issue poses little difficulty. From the evidence adduced at trial, the court is firmly convinced that the accident and Reusser's death was in fact caused by his intoxication.

The second issue may be arguable and less clear. However, as set forth below, the court is of the opinion that the question of whether Reusser had knowledge of the exclusion regarding intoxicants must be answered in the affirmative. Immediately below the box marked "Accepts PAI" in which Reusser placed his initials, the following language appears in the Rental Agreement:

> BY INITIALS, Customer declines or accepts PAI. If 'Accepts', customer accepts coverage at rate shown and acknowledges to have read the SYNOPSIS of Coverage Limits furnished by Lessor at rental.

The synopsis admitted into evidence as plaintiff's Exhibit 9 contains the exclusion relating to intoxicants. According to the unrefuted testimony of Cynthia Clark, the Rent Car employee who handled the Reusser rental transaction, plaintiff's Exhibit 9 was available to customers at the Boise airport outlet, and was located in a rack on the counter to the customer's right. There was no evidence adduced at trial to show the existence of any synopsis other than Exhibit 9 at the airport facility. Defendant offered defendant's Exhibit 10, a similar synopsis which did *not* contain the intoxicant exclusion, but due to the absence of any evidence showing its presence at the airport facility on July 6, 1979, the same was rejected for lack of relevancy.

Because Reusser, by his initials, acknowledged having read that synopsis of coverage "furnished by Lessor at rental",

and because it appears from the evidence adduced that plaintiff's Exhibit 9 was the only synopsis available for him to have read at the airport facility, the court must find and conclude that Reusser did in fact read plaintiff's Exhibit 9 and thereby acquired actual knowledge of the exclusion regarding intoxicants contained therein. The defendant had the impossible burden of showing that the deceased did not read and have knowledge of the exclusion in regard to coverage. The defendant has not sustained this burden.

Accordingly, plaintiff is entitled to a judgment declaring that Reusser's death, as a result of the accident on July 6, 1979, was not covered by American Bankers Insurance Company Personal Accident Insurance Policy No. 1901. Counsel for plaintiff shall prepare proposed Findings of Fact and Conclusion of Law and Judgment, serve copies of the same on counsel for the defendant, and submit the originals to the court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civ. No. 79-1404

American Bankers Insurance Company
Plaintiff

v.

Thomas Reusser, Administrator of the Estate
of Calvin E. Reusser

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before: Senior District Judge Fred M. Taylor
[Filed June 19, 1981]

On April 21, 1981, this action was tried to the court. Now, having considered the evidence adduced at trial and the written and oral arguments of counsel, the court believes itself to be fully advised of the facts and law relevant to this action and has reached the following conclusions:

FINDINGS OF FACT

1. American Bankers Insurance Company is a Florida corporation with its principal place of business in Florida. At all times relevent to this action, it was duly authorized to conduct business within Idaho;

2. Thomas Reusser is a citizen and resident of Idaho;

3. There is diversity of citizenship, and the amount in controversy in this action exceeds $10,000, exclusive of interest and costs;

4. Effective September 1, 1975, American Bankers issued Policy No. 1901 to the Insurance Protection Trust. Later that month, Rent Car, Inc., the Hertz Rent-A-Car licensee in Boise, Idaho, began its participation in the group insurance program administered by the Trust. Rent Car, Inc., operates three outlets in Boise, including one at the Boise Municipal Airport;

5. As amended, Policy No. 1901 provided, on the dates relevant to this lawsuit, insurance benefits of $150,000 payable on the death of a member of the group and benefits for medical and ambulance expenses incurred by members of the group with limits of $1,500 and $150 respectively;

6. Policy No. 1901 included the following provision:

> "This insurance shall not cover any loss caused directly or indirectly, wholly, or partly by . . . (e) intoxicants or narcotics . . ."

7. On July 6, 1979, Calvin Reusser rented a car from Rent Car at the outlet in the Boise airport. The terms of the agreement between Reusser and Rent Car appear in Rental Agreement No. L 2072771 1. In the course of the transaction, Reusser initialed a box on this rental agreement indicating his acceptance of Personal Accident Insurance (PAI) and acknowledging that he had read the "Synopsis of Coverage Limits" furnished by Rent Car at the outlet. The synopsis was located in a rack on the counter to Reusser's right. The synopsis stated:

> "This insurance shall not cover any loss caused directly or indirectly by . . . (e) intoxicants or narcotics . . ."

This synopsis was available for Reusser's inspection when he entered into the rental agreement;

8. Reusser read the synopsis and knew of the exclusion of coverage regarding intoxicants;

9. At approximately 11:45 p.m. on July 6, 1979, Reusser was killed in a one-car accident near Donnelly, Idaho. He was the driver and sole occupant of the car;

10. On July 20, 1979, the Idaho Bureau of Laboratories conducted an accurate test of a blood sample taken from Calvin Reusser's body that showed the blood alcohol content of the sample to be .26;

11. At the time of the accident, Calvin Reusser was intoxicated. This intoxication was the direct cause of the accident and Reusser's death.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this litigation. Venue is proper in this court;

2. Coverage under Policy No. 1901 for Reusser's death is excluded by the terms of the exclusion concerning intoxicants;

3. Calvin Reusser had notice of the terms of this exclusion when he entered into the rental agreement;

4. American Bankers is entitled to judgment declaring that Reusser's death was not covered by the PAI purchased by Reusser when the rented the car on July 6, 1979.

October Term, 1982

No. 82-1206

Thomas Reusser, Administrator of the Estate of
Calvin E. Reusser,

Petitioner,

v.

American Bankers Insurance Company,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 1983, three copies of this Brief in Opposition to Petition for Writ of Certiorari were served upon:

David B. Vaughn
Suite 107
355 North Orchard
Boise, Idaho 83706

by depositing the same in the United States mail, postage prepaid thereon, in compliance with rule 28. 3 of the Rules of the Supreme Court of the United States.

I further certify that all parties required to be served in this matter have been served.

Jeffrey A. Strother
Counsel for Respondent

There are no parent companies, subsidiaries or affiliates of Respondent American Bankers Insurance Company.